

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-2183

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

ANONYMOUS, AN ATTORNEY ADMITTED TO
PRACTICE IN THE STATE OF NEW YORK,

Plaintiff-Appellant,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW
YORK and JOHN G. BONOMI, Chief Counsel, Committee on
Grievances of the Association of the Bar of the City of New
York,

Defendants-Appellees.

*On Appeal from the U.S. District Court for the Southern
District of New York.*

REPLY BRIEF FOR PLAINTIFF-APPELLANT

ANDERSON, RUSSEL, KILL &
OLICK, P.C.

Attorneys for Plaintiff-Appellant

630 Fifth Avenue

New York, New York, 10020

397-9700

ARTHUR S. OLICK
STEVEN M. PESNER
Of Counsel

(7674)

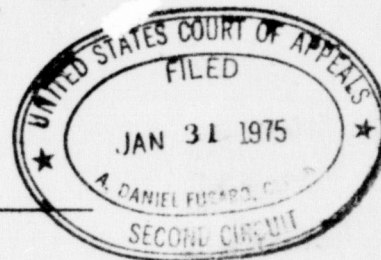
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J.
(201) 257-6850

New York, N. Y.
(212) 565-6377

Philadelphia, Pa.
(215) 563-5587

Washington, D. C.
(202) 783-7288



H

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Point I. The use by defendants of ap- pellant's Grand Jury testimony is plainly unconstitutional	2
Point II. Attorney disciplinary proceed- ings before the Bar Association do not constitute State court action	6
Point III. The extraordinary circum- stances present in this case compel federal intervention	11
Conclusion	12

TABLE OF CITATIONS

Cases Cited:

Allee v. Medrano, __U.S.__, 94 S. Ct. 2191 (1974)	2
Avon 42nd St. Corp. v. Myerson, 352 F. Supp. 944 (S.D.N.Y. 1972)	10
Boyle v. Landry, 401 U.S. 77 (1971)	9
Dolphin v. Association of the Bar of the City of New York, 240 N.Y. 89 (1925)	6
Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972)	6

ii
Contents

	Page
Eve Prods., Inc. v. Shannon, 439 F.2d 1073 (8th Cir. 1971)	9
414 Theatre Corp. v. Murphy, 360 F.Supp. 34 (S.D.N.Y. 1973)	10
Garrity v. New Jersey, 385 U.S. 493 (1967)	3, 4, 5
Geiger v. Jenkins, 316 F. Supp. 370 (N.D. Ga. 1970), aff'd, 401 U.S. 985 (1971) . .	6, 7
Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973)	9
Lake Carriers' Assn. v. MacMullan, 406 U.S. 498 (1972)	9, 10
Law Students' Civil Rights Research Coun- cil, Inc. v. Wadmond, 299 F. Supp. 117, (S.D.N.Y. 1960), aff'd, 401 U.S. 154 (1971)	10
Lefkowitz v. Turley, 414 U.S. 70 (1973) . .	4
Oldroyd v. Kugler, 352 F. Supp. 27 (D.N.J. 1972)	9
People ex rel Karlin v. Culkins, 248 N.Y. 465 (1928)	6
Rialto Theatre Co. v. City of Wilmington, 440 F.2d 1326 (3d Cir. 1971)	9

iii
Contents

	Page
Samuels v. Mackell, 401 U.S. 66 (1971) . . .	8
Spevack v. Klein, 385 U.S. 511 (1967) . . .	3, 4
Steffel v. Thompson, 415 U.S. 452 (1974) . . .	2, 8
Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973)	10
Ullman v. United States, 350 U.S. 422 (1956)	4
United States v. Solomon, Docket No. 74- 2316	5
United States ex rel Sanney v. Montanye, 500 F.2d 411 (2d Cir. 1974)	4
Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972)	9
Younger v. Harris, 401 U.S. 37 (1971)	2, 8, 9, 11
<u>Statute Cited:</u>	
28 U.S.C. §2283	7
<u>United States Constitution Cited:</u>	
Fifth Amendment	3

Contents

Page

Rules Cited:

New York Judiciary Law §90 (7) 6

Rules of Appellate Division, First Department, Section 603.12 6

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-2183

ANONYMOUS, AN ATTORNEY ADMITTED TO PRACTICE
IN THE STATE OF NEW YORK,

Plaintiff-Appellant,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW
YORK and JOHN G. BONOMI, Chief Counsel, Com-
mittee on Grievances of the Association of the
Bar of the City of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

Preliminary Statement

In his principal brief appellant argues that the doctrine of federal abstention was erroneously invoked by the District Court because (a) disciplinary proceedings before the Bar Association do not constitute state court action; (b) the doctrine does not preclude declaratory relief; and (c) the doctrine is inapplicable where, as here, there is bad faith on the part of the defendants. Appellant further

contends that the use by the Bar Association of his testimony before a Grand Jury under a grant of immunity violates his Fourth and Fifth Amendment rights.

The defendants support the application of the abstention doctrine on the grounds that in New York attorney-disciplinary proceedings are "by definition" an integral and inextricable part of the state judicial system and the Supreme Court's decision in Younger v. Harris, 401 U.S. 37 (1971), precludes declaratory as well as injunctive relief despite the Supreme Court's more recent decisions in Steffel v. Thompson, 415 U.S. 452 (1974) and Allee v. Medrano, U.S. , 94 S.Ct. 2191 (1974). Defendants also contend that it is constitutionally permissible to disbar an attorney on the basis of compelled testimony on the theory that attorney-disciplinary proceedings are "civil" and not "criminal" in nature because they do not involve "punishment".

Appellant submits this brief in reply to these contentions of defendants.

POINT I

THE USE BY DEFENDANTS OF APPELLANT'S GRAND JURY TESTIMONY IS PLAINLY UNCONSTITUTIONAL

Defendants concede that attorneys "cannot be disbarred. . . because they have pleaded or refused to waive

their Fifth Amendment rights" [Appellees' Brief p. 16]. They concede that "testimony given without a grant of immunity, because of the fear of governmentally imposed forfeiture of property or loss of employment were the privilege invoked, cannot be used against the witness in a government suit for forfeiture of property or in a criminal prosecution." [Appellees' Brief p. 16]. They concede that "neither the states nor the United States may penalize a person for his exercise of his Fifth Amendment privilege . . . nor . . . use against a person testimony that has been compelled by fear of a governmentally imposed punishment for the exercise of the privilege." [Appellees' Brief p. 16]. Yet, defendants contend that an attorney's compelled testimony may nevertheless be used to deprive him of his right to practice his profession.

Defendants' position respecting the merits of appellant's claim of constitutional protection is refuted by the decisions of the Supreme Court in Garrity v. New Jersey, 385 U.S. 493 (1967) and Spevack v. Klein, 385 U.S. 511 (1967). In Garrity the Court held that statements obtained by the State from police officers under threat of removal from office were involuntary and inadmissible in state criminal proceedings later brought against them. Spevack applied the same principle to a State's threatened disbarment of an

attorney for refusing to furnish incriminating statements and documents. Similarly, in Lefkowitz v. Turley, 414 U.S. 70 (1973), the Court held that a state could not compel incriminatory answers from independent contractors under the threat that unless they waived immunity they would be disqualified from contracting with state agencies.

The logical extension of these principles is the constitutional protection claimed by appellant in this case. As this Court noted in United States ex rel Sanney v. Montanye, 500 F.2d 411 (2d Cir. 1974):

"A statement challenged on the ground that it was obtained as the result of economic sanctions must be rejected as involuntary only where the pressure reasonably appears to have been of sufficiently appreciable size and substance to deprive the accused of his 'free choice to admit, to deny, or to refuse to answer.'"

500 F.2d at p. 415

Appellant clearly meets this Garrity-Spevack test. Defendants reliance upon Mr. Justice Douglas' dictum in Ullmann v. United States, 350 U.S. 422 (1956) to the contrary [Appellees' Brief pp. 16-19] is manifestly specious. As Mr. Justice Douglas held in Spevack v. Klein supra:

". . . [t]he threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege."

385 U.S. at p. 516

Appellant faced a "Hobson's choice." If he failed to testify after the grant of immunity he would have been prosecuted for contempt of court. Having testified he now faces disbarment. The situation is manifestly unjust and in plain derogation of appellant's Fifth Amendment rights.

Unlike the situation presented to this Court in United States v. Solomon, decided January 14, 1975 [Docket No. 74-2316], there is no question in this case concerning the voluntary nature of appellant's statement or the certainty of the penalty had he refused to testify. As Judge Friendly held in Solomon, "Garrity's interpretation of the privilege (against self-incrimination) applies only when the interrogator has the power to compel testimony against which the privilege would be a shield and the state has sought to shatter the shield by the threat that raising it will involve consequences as devastating as in that case." Here, these standards are clearly satisfied.

POINT II

ATTORNEY DISCIPLINARY PROCEEDINGS
BEFORE THE BAR ASSOCIATION DO NOT
CONSTITUTE STATE COURT ACTION

The contention that "federal court intervention in New York attorney-disciplinary proceedings is, by definition, intervention in the functioning of the state judicial system" [Appellees' Brief p. 19] is patently spurious. By "definition" Bar Association disciplinary proceedings are nothing more than preliminary, investigatory and advisory. Defendants may investigate charges of professional misconduct pursuant to New York Judiciary Law §90(7) and Section 603.12 of the Rules of the Appellate Division, First Department. They may recommend the bringing of disciplinary proceedings by the state court but their recommendations result in a de novo hearing before a court-appointed referee. Dolphin v. Association of the Bar of the City of New York, 240 N.Y. 89 (1925). Moreover, the state courts may ignore such recommendations or proceed in their absence. People ex rel Karlin v. Culkins, 248 N.Y. 465 (1928); Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972 cert. den. 409 U.S. 889 (1972)).

Accordingly, the facts demonstrate that, at least in New York, Bar Association disciplinary proceedings are only ancillary to and not part of the State court system. If Geiger v. Jenkins, 316 F.Supp. 370 (N.D.Ga. 1970), aff'd 401 U.S. 985

(1971), relied upon by defendants [Appellees' Brief pp. 7-8] has any relevance, it is as authority for the proposition that in considering the applicability of the doctrine of federal abstention it is necessary to look to state law to determine whether the proceeding sought to be enjoined is judicial in nature. In Geiger the plaintiff-physician sought to enjoin the Georgia State Board of Medical Examiners from revoking his license to practice medicine on the grounds that the Georgia legislature had improperly delegated legislative powers to the Board under an unconstitutionally vague statute. The Court found that under Georgia law the action of the Board of Medical Examiners was part and parcel of State court revocation proceedings. Accordingly, a federal injunction was barred by 28 U.S.C. §2283 and abstention was required because there were federal constitutional questions enmeshed with "unsettled questions of state law . . . which conceivably could be avoided by a state court adjudication of the questions arising under state law" [316 F.Supp. at p. 373].

Here, there is no state court proceeding pending so that anti-injunction statute [28 U.S.C. §2283] does not apply. Here, there are no "unsettled questions of state law" since the New York courts have already decided the federal constitutional issues adversely to appellant. Here,

the situation is similar to that presented in Zwickler v. Koota, 389 U.S. 241 (1967) where the Supreme Court held that declaratory relief may be proper even where injunctive relief is not because there was no pending state court proceeding within the meaning of 28 U.S.C. §2283.

An abstention case, as distinguished from an anti-injunction case, permits the grant of declaratory relief, Steffel v. Thompson, 415 U.S. 452 (1974). Defendants seek to obfuscate this essential distinction [Appellees' Brief p. 11]. If this case had already proceeded to the Appellate Division the decision below might well be justified. But this case is still before the Bar Association and only at its inception. Accordingly, at the very least, declaratory relief as demanded in the complaint (4a) is proper.

The doctrine of federal abstention enunciated in Younger v. Harris, 401 U.S. 37 (1971) must be understood in the context of the companion cases decided with it and in the context of subsequent decisions of the Supreme Court in this area. Younger stands for the proposition that injunctive relief against pending state prosecutions may be granted where there are special circumstances such as bad faith or harrassment by state authorities. Samuels v. Mackell, 401 U.S. 66 (1971) holds that not even federal declaratory relief may be granted when there is an actual

state prosecution pending absent the special circumstances of Younger. Boyle v. Landry, 401 U.S. 77 (1971) holds that a plaintiff seeking relief must show that a threatened prosecution will likely be brought and injure him irreparably.

The distinction between an actual and a threatened proceeding has become the cornerstone of many subsequent decisions. Both the Supreme Court and the lower federal courts have indicated that at least declaratory relief may be granted if no "prosecution" is pending against the federal plaintiff. Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972); Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973); Rialto Theatre Co. v. City of Wilmington, 440 F.2d 1326 (3d. Cir. 1971); Eve Prods., Inc. v. Shannon, 439 F.2d 1073 (8th Cir. 1971); Oldroyd v. Kugler, 352 F.Supp. 27 (D.N.J. 1972). In Lake Carriers' Assn. v. MacMullan, 406 U.S. 498 (1972) the Supreme Court itself refused to apply Younger on the grounds that the considerations underlying the abstention doctrine "have little force in the absence of a pending state proceeding." 401 U.S. at p. 509. The Court further held that absent a pending state prosecution both declaratory and injunctive relief would be proper wherever the plaintiff meets the usual standards for such relief. Id. The Lake Carriers case involved a suit challenging the validity of Michigan's water pollution laws on grounds of federal preemption. Whereas Michigan's statute

provided for criminal penalties no prosecution was yet pending. Of similar import to Lake Carriers are the more recent cases of 414 Theatre Corp. v. Murphy, 360 F.Supp. 34 (S.D.N.Y. 1973), Avon 42nd St. Corp. v. Myerson, 352 F.Supp. 994, 997 (S.D.N.Y. 1972) and Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973).

Thus, the essential issue is whether the commencement of a Bar Association investigation leading to a possible recommendation to the state court that disciplinary proceedings against an attorney are warranted constitutes a state prosecution. Defendants argue that it does because of the Court's "special interest" in attorneys. Yet the same "special interest" is present in connection with the admission of attorneys and federal jurisdiction has been asserted in such a case. Law Students' Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 124 (S.D.N.Y. 1960), aff'd. 401 U.S. 154 (1971).

POINT III

THE EXTRAORDINARY CIRCUMSTANCES
PRESENT IN THIS CASE COMPEL
FEDERAL INTERVENTION

It is indeed significant that defendants have chosen to completely ignore Point II of Appellant's principal brief. Younger v. Harris, supra, contemplates federal intervention where there is bad faith prosecution, harrassment or other special circumstances. Appellant charges that such special circumstances exist in this case because:

1. Defendants brought their disciplinary proceeding seven years after the operative events and five years after they knew of plaintiff's alleged involvement.
2. The New York courts have repeatedly ignored the constitutional principles plaintiff seeks to have determined in the District Court; and
3. The District Attorney induced plaintiff to testify on the understanding that there would be no disclosure to the defendant Grievance Committee.

Appellant submits that defendants' laches, the futility of proceeding before the state courts and the apparent bad faith of the District Attorney are all factors overlooked by the court below and constitute viable exceptions to the doctrine of federal abstention.

CONCLUSION

The judgment below should be reversed and the action reinstated with instructions to the District Court to decide the issues on the merits.

Respectfully submitted,

ANDERSON, RUSSELL, KILL & OLICK, P.C.,
Attorneys for plaintiff-appellant
630 Fifth Avenue
New York, New York 10020
(212) 397-9731

Arthur S. Olick
Steven M. Pesner

Of Counsel

APPELLATE DIVISION: THIRD DEPARTMENT

ZIMMERMAN,

Plaintiff-Appellant,

- against -

MURRAY,

Defendants-Respondents.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

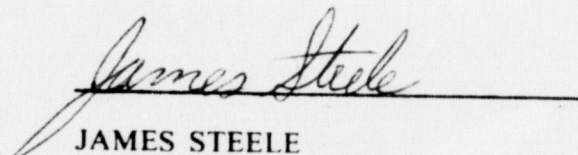
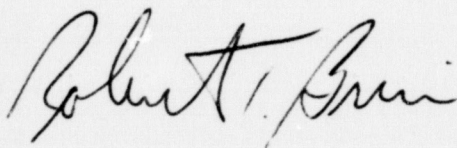
I, James Steele, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street, New York, New York
That on the 29th day of January 1975 at 36 W. 44th St., New York

deponent served the annexed Reply Brief

upon

John G. Bonomi,
the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 29th
day of January 1975


JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

